In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1208

EDMUNDO RODRIGUEZ-ROMERO, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A1-A7) is not yet reported. The memorandum order of the District Court for the Northern District of California (Pet. App. A8-A9)[1] is unreported.

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[1] Through typographical error, a few words are missing from the district court's order as reproduced in petitioner's appendix. Therefore, we have appended hereto a complete copy of the order.

JURISDICTION

The judgment of the Court of Appeals was entered on November 25, 1970. The petition for a writ of certiorari was filed on January 7, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether deportation of a long-time alien resident of the United States for conduct arising after his entry is inconsistent with the Eighth Amendment proscription against cruel and unusual punishment or the Fifth Amendment due process guarantee.

STATEMENT

The facts are not in dispute. Petitioner, a 25-year-old native of Mexico, entered the United States on June 17, 1948, at the age of three and has resided here continuously since that date. On December 3, 1965, he was convicted on a guilty plea in California state court of trafficking in marijuana in violation of Section 11531 of the California Health & Safety Code. Based on that conviction, the Immigration Service brought deportation proceedings against petitioner under Section 241(a)(11) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(11)[1] and ordered him deported to Mexico. The

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[1] Section 241(a)(11) provides:

> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

[Footnote continued on p. 3.]

Board of Immigration Appeals affirmed.

Petitioner challenged the ensuing order to surrender for deportation by a petition for a writ of habeas corpus in the District Court for the Northern District of California. There, he raised the same constitutional objections on which he now relies, and also contended that he is a citizen of the United States and thus could not be deported. The district court upheld the deportation order, finding that petitioner is an alien and rejecting the constitutional attack (Pet. App. A8-A9). The Court of Appeals affirmed per curiam (Pet. App. A1-A7).

ARGUMENT

Petitioner's sole contention in this Court is that deportation of a long-time resident alien amounts to cruel and unusual punishment and impermissible discrimination between alien and citizen. As he did

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[Continued]

(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate; * * *

in the courts below, petitioner here concedes that this Court has consistently held contrary to his contentions.

1. This Court has without exception held that deportation is not cruel and unusual punishment within the meaning of the Eighth Amendment since deportation proceedings are civil and not criminal. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594; *Mahler* v. *Eby*, 264 U.S. 32, 39; *Bugajewitz* v. *Adams*, 228 U.S. 585, 591. See also, *Kwai Chin Yuen* v. *Immigration and Naturalization Service*, 406 F.2d 489 (C.A. 9), certiorari denied, 395 U.S. 906; *Cortez* v. *Immigration and Naturalization Service*, 395 F.2d 965 (C.A. 5); *Chabolla-Delgado* v. *Immigration and Naturalization Service*, 354 F.2d 360 (C.A. 9). This view was recently confirmed in *Woodby* v. *Immigration Naturalization Service*, 385 U.S. 276; there, in construing the government's burden of proof in deportation proceedings, the Court explicitly noted that such proceedings are not criminal prosecutions. *Id.* at 285. There is consequently no reason for further consideration of this question.

2. Similarly unavailing is petitioner's assertion that deportation of an alien long a lawful permanent resident of this country is impermissible because a citizen is immune from deportation. This Court has frequently observed that distinctions between citizens and aliens are customary and valid under both international and domestic law; and it is well settled that under these principles Congress has broad powers and may deport aliens (such as petitioner) lawfully admitted for permanent residence. *Galvan*

v. *Press*, 347 U.S. 522, 531-532; *Harisiades* v. *Shaughnessy*, 342 U.S. 580; *Carlson* v. *Landon*, 342 U.S. 524; *MacKay* v. *McAlexander*, 268 F.2d 35 (C.A. 9), certiorari denied, 362 U.S. 961.

Petitioner could have sought naturalization, as can any alien who is a permanent resident, and thus have placed himself without the reach of the deportation statutes. But petitioner chose not to do so. In this circumstance, the language of *Carlson* v. *Landon*, *supra*, 342 U.S. at 534, is apposite:

> The basis for the deportation of presently undesirable aliens resident in the United States is not questioned and requires no reexamination. When legally admitted, they have come at the Nation's invitation, as visitors or permanent residents, to share with us the opportunities and satisfactions of our land. As such visitors and foreign nationals they are entitled in their persons and effects to the protection of our laws. So long, however, as aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

WILL WILSON,
Assistant Attorney General.

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GEORGE W. MASTERTON,
Attorneys.

FEBRUARY 1971

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 50575

Petition of

EDMUNDO RODRIGUEZ-ROMERO,
For a Writ of Habeas Corpus

ORDER

On December 3, 1965, petitioner was convicted on his own plea of guilty of transportation and sale of marijuana in violation of § 11531 of the California Health and Safety Code. Subsequently the Immigration and Naturalization Service ordered that petitioner be deported pursuant to 8 U.S.C. § 1251(a)(11), which provides in part that any alien convicted of a narcotic drugs or marijuana offense "shall, upon the order of the Attorney General, be deported * * *."

Petitioner seeks to avoid deportation by petitioning this Court for a writ of habeas corpus. The proposed deportation is alleged to be unlawful on two grounds: (1) that petitioner is a citizen of the United States, and thus is not subject to deportation, and (2) that deportation constitutes cruel and unusual punishment and a denial of due process. Having heard argument and considered the points and authorities presented by both sides, this Court concludes that petitioner is not a citizen of the United States and that the proposed deportation would not be unconstitutional.

Therefore IT IS HEREBY ORDERED that the petition for a writ of habeas corpus is denied.

Dated: January 30, 1969.

STANLEY A. WEIGEL
Judge

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